

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
The PPM Coalition's Emergency)	
Petition Requesting an Inquiry)	MB Docket No. 08-187
Under Section 403 of the)	
Communications Act of 1934,)	
as Amended)	

COMMENTS OF ARBITRON INC.

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SUMMARY

Arbitron Inc. (“Arbitron”) is not subject to the jurisdiction of the Federal Communications Commission (the “Commission”),¹ and the Commission lacks authority under the Communications Act of 1934, as amended (the “Act”), and indeed lacks the expertise, to address the reliability of radio audience ratings data, the methods used to estimate audience share, or other aspects of audience ratings. The PPM Coalition and its signatory members (collectively, the “Petitioners”), in their Emergency Petition for Section 403 Inquiry (the “Petition”), fail to identify a proper basis upon which the Commission could address the issues that the Petition raises, or a basis – legal or factual – upon which the Commission should initiate the requested investigation. Indeed, the Commission itself has recognized that it has no jurisdiction over the activities which the Petition seeks to have investigated, and Congress, after full hearings, reported its preference that these activities be subject to private industry review. Thus, the Petition should be rejected, and the Commission should allow the Congressionally-designed mechanisms to continue to work as contemplated.

The Petition seeks an investigation that could not be used to support any Commission regulation or to identify any possible violations of Commission rules or policies by any Commission-regulated entities. Rather, the Petitioners fear that the advent of the Portable People Meter™ (the “PPM”™), an innovative technology created by Arbitron and used by advertisers and media buyers (private parties who are also completely outside of the Commission’s jurisdiction), will affect the value of the privately-held assets of the Petitioners.

¹ Arbitron’s filing of these Comments is not an admission of any jurisdiction or authority on the part of the Commission over Arbitron, its business activities, or its contractual and other arrangements. Arbitron expressly objects to any exercise of Commission jurisdiction over it, and reserves all its rights in that regard.

The underlying gravamen of the Petitioners' request is that the PPM methodology provides different estimates of audience shares for their radio stations from the estimates produced by the diary system that has traditionally been used. The differences are in fact important improvements that PPM offers over the diary (for example, the objective recordation of actual exposure to radio signals on the part of the PPM participant, as opposed to the diary-keeper's self-reporting of his or her listening experiences, based upon memory and other subjective factors). These improvements respond to the specific request from advertisers for a higher level of accountability in the data that is collected and provided by Arbitron.

Even though the Petitioners acknowledge that the Commission has no authority to grant any order that would control PPM or its use, the Petitioners press the Commission not merely to seek comments and information, but to use the heavy and intrusive mechanisms of adversarial proceedings, subpoenas, oral testimony before an administrative law judge, and even cross examination, so that the Petitioners may have the benefit of a government-enforced fishing expedition to find some basis upon which to attack PPM in other fora. The text of Section 403 of the Act, the Commission's prior use of Section 403, and the precedents on the Commission's role in matters ancillary to its jurisdiction demonstrate that a Section 403 proceeding is not proper here.

That is particularly so, because even if a proceeding were to be held, there is no relief that the Commission can provide that addresses the Petitioners' stated concern. The Commission has no authority to make determinations of "reliability" of ratings methodologies, even if the Commission had any experience or expertise in that area (which it does not). Congress has explicitly left accreditation of ratings methods to a private, industry-formed organization, and not to the Commission. Nor can the Commission require that particular ratings

methodologies be utilized, or bar the use of other methodologies. The First Amendment prevents that.

Even if the Commission had authority in this area, the Petition relies on falsely-premised assertions and ill-reasoned conclusions about PPM, the data produced by the PPM methodology, and the effect of such data upon stations and markets. Regardless of any ratings data or other information about listeners and market shares, several facts stand unchallenged: there is an audience for radio, including specifically audiences for programming that is targeted to various minority groups, whether African-American, Hispanic or other; and advertisers will continue to seek to reach the consumers who make up those audiences. Moreover, advertisers and their media-buying advisers are sophisticated purchasers of targeting information – it is their dollars and the sale of their products which ultimately drive the advertising and other revenues of the Petitioners' stations and all other stations. New data-gathering methods that report different estimates of audience shares from what was previously reported do not change actual audiences, and do not change the willingness or the interest on the part of advertisers in seeking to reach those audiences. At most, changes in audience estimates require stations, advertisers, and their advisers to consider how to use those changes to accomplish their goals. As described in these Comments, that is exactly the experience of those markets where PPM has already been in commercial use – stations, including minority-owned and/or minority-oriented stations, have adapted to the additional granularity, timeliness, and accountability of the PPM-produced data to maintain their competitiveness in relation to their market rankings under the diary system. The Petitioners' unsupported hyperbole that PPM will spell the end of minority radio in the United States is simply an unfounded reaction to the disruption in established patterns that any new and innovative technology brings, PPM being no exception.

Throughout the development of PPM and the process of commercialization in different markets, Arbitron has sought to refine the methodology, has listened to the concerns and criticisms of the various stakeholders (station owners, advertisers, and others, especially including the industry-created self-regulatory authority known as the Media Rating Council, Inc., or “MRC”) and has worked to respond to those concerns. Arbitron has proceeded in conformance with the MRC’s Voluntary Code of Conduct to commercialize its new PPM service, even while making adjustments in response to comments from interested parties, including undergoing an exhaustive audit of PPM by an independent professional auditor (Ernst & Young), which confirmed the basic soundness of the PPM technology and survey methods. Instead of committing to work with Arbitron to continually improve the data that PPM produces and its use, the Petitioners have now functionally terminated that ongoing, workmanlike process, in favor of an adversarial, ultimately bootless investigational proceeding. Arbitron urges the Commission to recognize that the better mechanism by which the Commission can continue to foster its goal of minority ownership in broadcasting and the health of the radio broadcasting industry is to allow PPM to continue to evolve in incremental steps, with Arbitron applying the lessons learned from each market commercialization to improve the process, the data, and the level of coordination with stakeholders. As the market commercializations continue, and even more information about the use and effect of PPM becomes available, the Commission can proceed less formally than by way of an intrusive and adversarial Section 403 inquiry to solicit actual experience, not anticipatory fears, and obtain valid data on actual market and other effects, not anxious and unfounded projections.

These Comments demonstrate that in the key arguments presented in the Petition, the Petitioners have either misstated or exaggerated the facts, rendered significantly-incomplete

depictions of the actual conditions attendant upon the deployment of PPM, and laced the discussion with overheated rhetoric that is remarkably lacking in evidentiary support, documentation, or verification. Contrary to the Petition, that PPM does not undertake to measure certain subjective characteristics of audience behavior (such as “brand loyalty”) is not a defect. In fact PPM does a better job than the current diary method of capturing participant exposure to radio signals, which is the stated purpose of PPM and of the diary system which it is supplanting, and PPM samples are representative of young adults, Hispanics, and Blacks in the markets in which PPM is being deployed.

Were the Commission to institute a formal Section 403 inquiry, Arbitron’s management and its key research and development executives would be diverted from their ongoing efforts to work with the various constituencies (radio stations, advertisers, advertising agencies, and the MRC) regarding possible methods for refining or improving the PPM service, and Arbitron would be discouraged from making ongoing innovations in that service, for fear that any such innovations might be used by PPM adversaries as implicit admissions that the pre-innovation service was somehow deficient. The requested intervention by the FCC will not serve to advance, but on the contrary will retard, the progress that private parties acting in their own best interests have made in adapting to an initially-disruptive, but ultimately technologically-superior, methodology.

For all these reasons, as described in more detail below, the Commission should deny the Petition, while continuing to allow its staff to gather information about actual PPM experience.

TABLE OF CONTENTS

	Page
Summary	i
Table of Contents	vi
I. Introduction and Statement of Interest.....	1
II. Comments in Opposition to Petition.....	2
A. The Commission Lacks Jurisdiction to Initiate an Investigation of PPM	2
1. There is no statutory authority to conduct an investigation	3
2. The Commission also lacks ancillary jurisdiction to support the requested investigation.....	7
3. The Commission and Congress have both recognized that audience ratings are properly controlled by a private organization, not by governmental authority	10
4. The Commission has refused to use Section 403 for purposes outside of its jurisdiction.....	13
B. The Requested Section 403 Proceeding Would be Bootless	16
1. The Commission can make no orders as a result of the investigation	16
2. The requested process is the wrong process.....	19
C. The Petition Is Replete with Misstatements of Significant Facts, Unsupported Speculation, and Overheated Rhetoric, and Does Not Present a Valid Basis for Commission Action	22
1. Predictions of Disaster for Radio Stations that Target Minority Audiences Have Not Proven Correct in Actual Experience	23
2. To the Best of Arbitron's Knowledge, PPM is the Only New Radio or Television Currency Ratings System in History to be Accredited by the MRC Prior to Commercial Deployment.....	29
3. PPM Does Not Change the Audience Measurement Objective for Arbitron's Surveys, which (like the Diary) is to Measure Exposure to Radio Programs and Advertising, not Listener Loyalties or Preferences	32
4. Minority and Young Adult Representation Are as Good or Better in PPM Samples as Arbitron's Diary Survey.....	35
III. Conclusion.....	40

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COMMENTS OF ARBITRON INC.

Arbitron Inc. (“Arbitron”) hereby respectfully submits its Comments in response to the *Public Notice* entitled “Media Bureau Action, PPM Coalition Files Petition Seeking Commission Inquiry Pursuant to Section 403 of the Communications Act (47 U.S.C. § 403),” MB Docket No. 08-187, DA 08-2048, released by the Federal Communications Commission (the “Commission”) September 4, 2008 (the “*Public Notice*”). The *Public Notice* invited comments from interested parties with respect to the Emergency Petition for Section 403 Inquiry (the “Petition”) that was filed with the Commission on September 2, 2008 by an organization calling itself the PPM Coalition (the PPM Coalition, together with its members, are referred to in these Comments collectively as the “Petitioners”).

I. INTRODUCTION AND STATEMENT OF INTEREST

The Petition urges the Federal Communications Commission (the “Commission”) to initiate an investigation under Section 403 of the Communications Act, as amended (the “Act”) in order to “assess the reliability” of data produced by Arbitron’s Portable People Meter™ (“PPM”™) service and the “impact of its commercial use” on certain radio stations. PPM is

a service that was created and is used by Arbitron as part of its business of estimating the audiences of radio stations serving particular markets. Arbitron produces ratings reports that estimate the “share” or number of listeners of different stations in a market, and makes those data available in different forms to buyers of media services, to stations, and to other subscribers. Neither PPM, nor Arbitron’s use of PPM, and indeed none of Arbitron’s business, is regulated by the Act, and the Petitioners have not identified any proper mechanism by which the Commission is empowered to “assess” any aspect of PPM.

For the reasons set forth in these Comments, the Petitioners have failed to provide a proper basis for the Commission to grant the Petition, and it should be denied.

II. COMMENTS IN OPPOSITION TO PETITION

A. The Commission Lacks Jurisdiction to Initiate an Investigation of PPM

A fundamental aspect of the Commission’s authority is that while it is broad, it is not unbounded, and the courts have repeatedly barred the Commission from imposing requirements or taking actions that exceed its authority. The Act confers broad authority upon the Commission over the “dynamic aspects of radio transmission.”² Nonetheless, “[t]hough afforded wide latitude in its supervision over communications . . . , the Commission was not delegated unrestrained authority.”³ Just as the United States Supreme Court found that the Commission could not stretch the bounds of its authority in order to promote the access rules at

² *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979) (quoting *FCC v. Pottsville Broadcasting Co.*) (“*Midwest I*”).

³ *Midwest II*, 440 U.S. at 706.

issue in *Midwest II*, the Commission cannot find in the Act or in its ancillary jurisdiction the authority to initiate the proceeding that the Petition requests.

1. There is no statutory authority to conduct an investigation

Section 403 of the Act broadly allows the Commission to conduct investigations into matters related to the Commission's responsibilities.⁴ The Commission has properly confined that authority, however, to two general circumstances: investigations into the activities of regulated entities themselves that involve serious misconduct or outright criminal activities;⁵ and, but only where Congress has given an express appropriation in support, investigations into regulated entities and their arrangements with non-regulated entities, with respect to the fulfillment of the regulated entities' regulatory obligations. The Petition seeks an investigation that would not be within Section 403's range, that would be directed outside of the proper sphere of the Commission's authority, and that would be aimed at the lawful operations of a specific company – Arbitron – that is not a regulated entity of the Commission and that is completely beyond the Commission's jurisdiction.

Section 403 grants the Commission the “full authority and power at any time to institute an inquiry, on its own motion . . . concerning which any question may arise under any provision of this Act....”⁶ While the Petition identifies the Commission's implementation and

⁴ 47 U.S.C. § 403, implemented in the FCC's regulations by Section 1.1 of the Commission's Rules, 47 C.F.R. § 1.1.

⁵ See, e.g., *Inquiry into Alleged Violations of Sections 317 and 508 of the Communications Act of 1934, as amended, and the Rules Thereunder*, 62 FCC 2d 111 (1976) (investigation into practices known as “payola” and “plugola”).

⁶ 47 U.S.C. § 403. The Commission's rule implementing Section 403, 47 CFR § 1.1, is even broader than the statute. Rule 1.1 states that the Commission may “hold such proceedings as it may deem necessary from time to time . . . for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or

(continued...)

enforcement of provisions of Sections 1, 257, 303(g) and 309(j) of the Act ⁷ as somehow providing a basis for its request, those provisions (requiring the Commission to promote nondiscrimination, eliminate market entry barriers, ensure diverse program services to consumers, and promote minority broadcast ownership) provide no authority over audience survey methodologies or over Arbitron, and provide no authority by which the Commission is empowered to determine the “reliability” of PPM.

The Petitioners argue that that sweeping language of Section 403 should be given broad application. That argument is unavailing, because the courts have routinely confined the Commission to the authority that Congress gave it, and no more. In *Midwest II*, the Court vacated a Commission rule that would have required cable television systems having more than 3,500 subscribers to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for such access. ⁸ In finding the rule to be beyond the Commission’s statutory authority, the Supreme Court noted that the Act gave the Commission no specific authority over the obligations of cable operators, and that the rule in question effectively imposed common-carrier status upon the cable operators, which the Commission was explicitly prevented from doing by Section 3(h) of the Act. ⁹ Because the rule was neither authorized by specific provisions of the Act, nor “reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of

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amendments of its rules and regulations.” *Id.* Of course, the Commission by breadth of regulatory pronouncements cannot confer upon itself more authority than Congress granted. *See Midwest II*, 440 U.S. 689 (1979). Rule 1.1 must be confined to the same limits as the statutory language.

⁷ 47 U.S.C. §§ 151, 257, 303(g), and 309(j).

⁸ *Midwest II*, 440 U.S. at 691-96.

⁹ *Id.* at 696, 701-02.

television broadcasting,”¹⁰ the Court concluded that the Commission had exceeded its authority, and the rule was not allowed to stand.¹¹

In the last six years, the United States Court of Appeals for the District of Columbia Circuit has twice struck down Commission actions as being beyond the scope of its jurisdiction. First, in *Motion Picture Association of America v. FCC* (“MPAA”), the Motion Picture Association of America successfully challenged a Commission order requiring video description to accompany certain television broadcasts.¹² The Court rejected the Commission’s assertion that Section 303(r) of the Act, which permits the Commission to regulate radio or wire communications as necessary to carry out the public-interests requirements of the Act, could support the video-description regulations, which were unauthorized by Congress.¹³ The Court held that “the FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue,” and that the “FCC must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under § 303(r).”¹⁴

More recently, in *American Library Association v. FCC* (“American Library”), the Court of Appeals for the District of Columbia Circuit struck down the Commission’s efforts to impose a so-called “broadcast flag” regulation as an unauthorized extension of Commission jurisdiction, finding that the regulation would have extended to unlicensed consumer-electronics

¹⁰ *Id.* at 708 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

¹¹ *Id.*

¹² 309 F.3d 796 (D.C. Cir. 2002).

¹³ *Id.* at 798 (“By its terms the [Telecommunications Act of 1996] does not provide the FCC with the authority to enact video description rules.”).

¹⁴ *Id.* at 806 (emphasis in original).

products that are not engaged in the transmission of communications.¹⁵ Noting that the Act does not give the Commission authority “to regulate *any* ‘apparatus’ that is associated with television broadcasts,”¹⁶ the Court held that because the broadcast flag order did not regulate the actual transmission of the digital television broadcast, and because the demodulator products at issue are not themselves engaged in “‘communication by wire or radio’ when they are subject to regulation under the Flag Order,” the Commission had exceeded the scope of its general jurisdictional grant under Title I of the Act, and no ancillary jurisdiction would be found.¹⁷

While the Petitioners cloak their argumentation in the policy guise of fostering minority ownership and diversity in programming, the Petition asks the Commission to investigate the “reliability” of the PPM methodology and the alleged effect of PPM on advertising revenues of particular kinds of radio stations. In its remarkably short discussion of the issue of the Commission’s jurisdiction, the Petition is devoid of references to the holdings in *Midwest II*, *MPAA*, and *American Library*. Indeed, the Petition’s argument founders on the most basic point: the Commission has no authority over PPM. Arbitron is not a licensee of the Commission, nor is it otherwise subject to Commission regulatory authority.¹⁸ Nor has Congress specifically appropriated any funding for the Commission to investigate Arbitron or the PPM service. Because PPM and Arbitron are outside of the Commission’s authority, the

¹⁵ 406 F.3d 689 (D.C. Cir. 2005).

¹⁶ *Id.* at 703 (emphasis in original).

¹⁷ *Id.*

¹⁸ Arbitron’s business of gathering data, making estimates of market shares, and providing various reports to its customers are not at their core engaging in communications by wire or radio, and, as the United States Court of Appeals for the District of Columbia Circuit has observed, “No case has ever permitted, and the Commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in ‘communication by wire or radio.’” *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975).

implementation of PPM is not a “question” which “arises under” a provision of the Act; no provision of the Act gives the Commission any direct authority over such matters. The requested investigation is thus outside of the Commission’s jurisdiction.

2. The Commission also lacks ancillary jurisdiction to support the requested investigation

Perhaps recognizing that the Commission has no direct authority to regulate PPM or Arbitron, the Petitioners argue that the breadth of the Act’s general provisions and the Commission’s authority to vindicate the public interest would support “ancillary” jurisdiction to investigate PPM. The Commission should rightly recognize that the Petition’s request seeks to thrust the Commission into an area that is well outside of even the penumbra of ancillary jurisdiction.

It is a truism that the Act confers a sphere of ancillary jurisdiction upon the Commission to regulate in areas that are not specifically delineated in the Act itself.¹⁹ In *U.S. v. Southwestern Cable Co.* (“*Southwestern Cable*”), the Supreme Court concluded that the retransmission of television signals by cable systems was sufficiently related to the regulatory authority found in Section 152(a) of the Act²⁰ to support jurisdiction, and that the challenged regulation was necessary to ensure the Commission’s ability appropriately to regulate television broadcasts.²¹

However, the doctrine of ancillary jurisdiction does not provide the Commission with unrestrained authority, and certainly does not support intrusion into the oversight of the

¹⁹ *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

²⁰ 47 U.S.C. § 152(a).

²¹ *Southwestern Cable*, 392 U.S. at 172-78.

radio station audience measurement industry. Courts have been explicit in subsequent decisions that the Commission’s ancillary jurisdiction is limited to its delegated authority.²²

The statutory authority cited by the Petitioners (*i.e.*, Sections 303(g) and 303(r) of the Act) does not support a finding of ancillary jurisdiction under Section 154(i) of the Act.²³ Under *Southwestern Cable*, the Commission has ancillary authority based upon Title I’s general grant of jurisdiction only when it is “reasonably ancillary to the effective performance of the Commission’s various responsibilities” delegated to it by Congress.²⁴ Here there is no appropriate connection. Although Title I of the Act does allow the Commission to regulate interstate radio communications in the public interest,²⁵ Section 154(i) specifically limits the Commission’s authority to areas of the Commission’s jurisdiction.²⁶ Moreover, even if Section 154(i) were interpreted to allow the Commission to have some bare authority over audience ratings services, the Commission would still not be able to satisfy the second prong of the *Southwestern Cable* test. The *MPAA* Court interpreted Section 303(r) only to support regulations that are for the “necessary and proper” administration of specific FCC subject-matter jurisdiction rooted in other provisions of the Act.²⁷ Because Congress has never given the Commission subject-matter jurisdiction over audience measurement services, and – in fact, as will be discussed shortly, actually decided against conferring such jurisdiction upon the Commission –

²² *Midwest II*, 440 U.S. 689, 706; *MPAA*, 309 F.3d 796, 798-99 (D.C. Cir. 2002); *American Library*, 406 F.3d 689, 705 (D.C. Cir. 2005).

²³ Petition, at 16 n.44.

²⁴ *American Library*, 406 F.3d at 700 (quoting *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968)).

²⁵ See, e.g., 47 U.S.C. § 151.

²⁶ 47 U.S.C. § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this Act*, as may be necessary in the execution of its functions.”) (emphasis added).

²⁷ *MPAA*, 309 F.3d at 806.

Section 303(r) cannot provide ancillary jurisdiction to the Commission to investigate the PPM methodology or its results.

The Petitioners' citation to Section 303(g) is similarly unavailing. Section 303(g) only provides the Commission with the authority to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."²⁸ Audience measurement services are no more connected to new or experimental uses of radio than are, for example, the sales strategies of retailers of radio receivers; and the mandate in Section 303(g) to encourage the "larger and more effective use of radio in the public interest"²⁹ cannot be stretched to extend Commission authority over Arbitron's radio audience measurement service any more than that same mandate could be stretched to extend Commission authority over the construction of a new skyscraper in Chicago that might incidentally block the ability of nearby residents to receive television signals, a proposition that has been rejected by the Commission³⁰ and by a reviewing court.³¹

Other groups, also wrapping themselves in the mantle of the "public interest," have previously sought to interject the Commission into areas outside of its ancillary jurisdiction, and those attempts have been properly rejected. The Commission's lack of ancillary authority to adopt broadcast flag rules was addressed in *American Library, supra*. In 1972 a group of citizens, claiming ancillary jurisdiction, urged the Commission to issue an order halting the construction of the Sears Tower in Chicago, lest it affect television broadcast reception in the

²⁸ 47 U.S.C. § 303(g).

²⁹ *Id.*

³⁰ *See Illinois Citizens Committee for Broadcasting v. Sears, Roebuck & Co.*, 35 FCC 2d 237 (1972).

³¹ *See Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972).

greater Chicago area.³² Even though the Commission has some authority to foster broadcast signal reception, the Commission recognized that it had no jurisdiction under the “public interest” standard to address building heights or locations, and denied the petition.³³ That decision was upheld by the United States Court of Appeals for the Seventh Circuit.³⁴

Just as the Commission had no authority to stop the construction of the Sears Tower or to compel that video recording devices be manufactured in such a way that they would recognize and obey codes to prevent the unauthorized copying and distribution of copyrighted television broadcast programs, the Commission has no authority over the gathering, analysis, compilation, and dissemination of radio audience survey data. The Petitioners seek to advance an unbounded view of Commission jurisdiction that would allow the Commission plenary authority to regulate not merely radio station licensees and their conformance to the Commission’s rules and the terms of their station licenses, but also to regulate all those who do business with such licensees. There is simply no support in the Act or in the cases for that view, and it has regularly and recurrently been rejected by the Commission and by the courts.

3. The Commission and Congress have both recognized that audience ratings are properly controlled by a private organization, not by governmental authority

The filing of the Petition is not the first time that the Commission has been asked to regulate audience ratings, and both the Commission and Congress have previously recognized that the Act does not give the Commission that authority. Both Congress and the Commission

³² *Illinois Citizens Committee for Broadcasting v. Sears, Roebuck & Co.*, 35 FCC 2d 237 (1972).

³³ *Id.*

³⁴ *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972).

have expressly stated that the reliability and methodologies of audience ratings services are best left to private industry groups.

In 1980, the Commission, having before it a staff report that concluded that ratings services may not accurately estimate the audiences of minority-programmed stations,³⁵ nonetheless expressly rejected a request by a minority broadcast organization to investigate audience ratings firms. The Commission found that “[it] does not appear to have direct jurisdiction over audience ratings firms,” and, thus denied a request “that the Commission investigate the alleged failure of audience ratings firms to adequately sample Black listeners and viewers.”³⁶ Rather than initiating an investigation, an action that would have been outside of its authority, the Commission asked its staff to review further whether “undercounting of minority audience may tend to hinder [the Commission’s] efforts to expand opportunities for minority ownership through its deleterious effect on the success of minority-oriented programming.”³⁷

Likewise, the Commission’s staff has recognized in recent correspondence from the Senior Deputy Chief of the Media Bureau to a Congressman that “. . . Arbitron . . . is not regulated by the Commission,” and that “. . . the rates and practices of the advertising industry are not subject to regulation by the Commission.”³⁸

³⁵ See “Minority Ownership of Broadcast Facilities: A Report,” Federal Communications Commission, Office of Public Affairs, EEO-Minority Enterprise Division (Dec. 1979) at 18-21. (The publication is a staff report summarizing the findings of CCG, Inc., an outside consultant firm that the Commission contracted to study various issues related to minority broadcast ownership.)

³⁶ *Rules and Policies to Further the Advancement of Black Americans in Mass Communications*, 76 FCC 2d 835 (1980) ¶¶ 30, 44.

³⁷ *Id.* ¶ 30.

³⁸ See Letter from Roy J. Stewart, Senior Deputy Chief of the Federal Communications Commission’s Media Bureau, to Congressman Gene Taylor of Mississippi (March 20, 2008). A copy of the letter is appended to these Comments as Appendix 1. While staff letters are, of

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The Commission's rejection of the petition requesting an investigation in 1980, and the staff's continued and recent recognition of the limits of Commission power, reflect Congress's own prior refusal to grant the Commission any role in regulating audience ratings services. In the mid-1960s, a Special Subcommittee on Investigations of the United States House of Representatives' Committee on Interstate and Foreign Commerce, chaired by Representative Oren Harris (the "Harris Committee"), held a number of hearings on the regulation of the television and radio industries, as well as the purpose and accuracy of audience research services.³⁹ After investigation and extensive testimony, the Harris Committee determined that industry self-regulation, including independent audits of media audience measurement services, was preferable to government intervention. The Harris Committee Report stated:

The enactment, at this time, of legislation providing for government regulation of broadcast audience measurement activities is not advisable. The administration of a statute providing for such regulation would place an unnecessary burden on the Federal Government, and it is doubtful that more would be accomplished than can be accomplished by effective industry regulation.⁴⁰

There is no reason for the Commission to revisit, much less revise, its earlier conclusion that it lacks authority to regulate audience measurement services, especially given an express Congressional determination not to grant it that authority. The Commission lacks direct and ancillary jurisdiction over Arbitron and PPM; therefore the Section 403 investigation

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course, not binding upon the Commission, they do reflect the staff's understanding of the Commission's policies and precedents.

³⁹ House Rpt. No. 1212, 89th Congress (1966).

⁴⁰ *Id.* at 21.

advocated by the Petitioners would not address a question which “arises under” any provision of the Act, and hence the Petition must be rejected.

4. The Commission has refused to use Section 403 for purposes outside of its jurisdiction

Section 403 investigations have been relatively infrequent, especially in recent years. A review of their historic use establishes that they have been used only in circumstances (i) where Congress has expressly appropriated money to support an investigation in order to bring general practices of the broadcast industry to light and to allow consideration whether expanded authority might be required, and (ii) to investigate actions by entities that are regulated by the Commission, where those actions directly relate to those entities’ compliance with the Act and with the Commission’s rules and regulations, including specifically serious matters of corruption or misuse of those entities’ authority. The vast majority of those investigations have been in the second category, involving allegations of violations of specific Commission rules, including allegations of serious misconduct such as violations of the so-called “payola/plugola,” anti-greenmail, and anti-collusion rules.⁴¹ In no instance has the Commission extended its investigative authority under Section 403 into a general inquiry into the businesses and activities of persons or entities that were not regulated entities, employees of such regulated entities, or applicants for Commission authorizations, absent a specific Congressional authorization for such an inquiry. The Commission has generally used the Section 403 authority appropriately to

⁴¹ See, e.g., *Inquiry into Alleged Abuses of the Commission’s Auction Processes by Applicants for Licenses in the Interactive Video and Data Services*, 9 FCC Rcd 6906 (1994); *Inquiry into Alleged Abuses of the Commission’s Processes by Applicants for Broadcast Facilities*, 4 FCC Rcd 1568 (1989); *Inquiry into Alleged Violations of Sections 317 and 508 of the Communications Act of 1934, as Amended, and the Rules Thereunder*, 62 FCC 2d 111 (1976); *Inquiry into Alleged* (continued...)

examine regulated entities or applicants for station authorizations, *i.e.*, entities whose operations are clearly within the purview of the Commission’s statutory jurisdiction and authority, or whose actions were directly related to alleged abuse of authority or abdication of responsibility under the Commission’s regulations.

The Commission’s use of its authority under specific Congressional appropriation is exemplified by the Commission’s investigation beginning in 1959 to develop comprehensive information on the respective roles played by networks, advertisers, agencies, talent, film producers, and distributors in the creation of television programming. The history of that investigation, and the explicit Congressional appropriation to support it, are set out in *FCC v. Schrieber* (“*Schreiber*”).⁴² That investigation, although extending broadly, had two specific characteristics which the inquiry that is sought by the Petitioners lacks: Congress had expressly appropriated funds to support the investigation,⁴³ and the investigation was focused on whether station licensees were abdicating to networks or to non-licensee entities their obligation to remain in control of their programming content.

Similarly, in *Stahlman v. FCC* (“*Stahlman*”), the United States Court of Appeals for the District of Columbia Circuit upheld subpoenas in relation to a Commission investigation into ties between newspapers and radio stations, and whether there should be limits on cross ownership, *i.e.*, an issue that went directly to the qualifications of particular applicants to obtain a

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Violations of Sections 317 and 508 of the Communications Act of 1934, as Amended, and the Rules Thereunder, 3 Rad. Reg. 2d (P&F) 827 (1964).

⁴² 381 U.S. 279 (1965).

⁴³ *Id.* at 281 & n.2.

radio station license from the Commission.⁴⁴ The Court first noted that the Commission had not been “grant[ed] unlimited power, but only the right to control the range of investigation in ascertaining what, *within the compass of the Act*, is proper to satisfy the requirements [related to ownership].”⁴⁵

More recently, the Commission has used its investigative authority to address allegations of so-called “payola” and “plugola” and abuses of the Commission’s auction processes.⁴⁶ Again, in those instances, the Commission’s investigation was limited to areas directly within its core jurisdiction, namely, licensee compliance with the Act, the Commission’s rules and regulations, the conditions of their station licenses, their acceptance of payments to influence programming, or applicant compliance with or abuse of the Commission’s auction processes.

Nothing in the Commission’s range of prior investigations suggests that the Commission has ever taken the position that it has authority to investigate the business activities of a company like Arbitron that is wholly outside of its jurisdictional authority, where there is no allegation that the company is actively engaged in arrangements that are part and parcel of a

⁴⁴ 126 F.2d 124 (D.C. Cir. 1942).

⁴⁵ *Id.* at 127 & n.5 (emphasis added). The Court in *Stahlman* decided that the Commission could not use Section 403 to require witnesses to bare records “in the hope that something will turn up” *Id.* at 128. Yet, that seems to be the Petitioners’ intent in filing and prosecuting their Petition. In a Section 403 investigation, the only “party” to the proceeding is the Commission itself. Petitioners, however, appear eager to confer upon themselves not merely a role in attending public proceedings (if any were to be held), but a right to review documents and apparently even to examine or cross-examine witnesses. As discussed in Section II.B.2 of these Comments, below, that would be a misuse of Section 403, and such a contemplated misuse constitutes an independent reason why the Petition should be denied.

⁴⁶ See, e.g., *Inquiry into Alleged Violations of Sections 317 and 507 of the Communications Act, as Amended, and the Rules Thereunder*, 62 FCC 2d 111 (1976); *Inquiry into Alleged Abuses of the* (continued...)

licensee's violation of its regulatory obligations. Here, the Petitioners seek an investigation into matters that the Commission has previously recognized are beyond its authority, and that Congress has considered and expressly left to private industry, and hence the Petition must be denied.

B. The Requested Section 403 Proceeding Would be Bootless

For the reasons set forth above, the Commission has no authority to initiate the requested Section 403 investigation, either as a matter of direct statutory authority or under the broader range of its ancillary jurisdiction. Even assuming *arguendo* that the Commission had some authority to investigate PPM, that investigation could not lead to any relief that the Commission could grant within its authority, and the Commission could not give the Petitioners what they seek. Thus, even if initiating a Section 403 investigation were within the Commission's discretion, the Commission should deny the Petition.

1. The Commission can make no orders as a result of the investigation

Even assuming, for the sake of argument, that the Commission were to order an investigation into PPM, there is no outcome of the investigation that could result in relief to the Petitioners. The Petitioners ask the Commission to examine, and apparently to make determinations regarding, the "reliability" of PPM, and further to examine the potential effect of the PPM methodology upon the revenues of minority-owned and/or minority-oriented radio

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Commission's Auction Processes by Applicants for Licenses in the Interactive Video and Data Services, 9 FCC Rcd 6906 (1994).

stations. Such endeavors would be a waste of the Commission's limited staff and other resources, for the following reasons:

- The Commission has no expertise in social science research or survey methodology, human psychology and behavior, ethnology, or the technology that Arbitron has developed over 16 years to bring PPM to market, and no experience or expertise in audience ratings. Indeed, as noted above, the Commission itself reached that conclusion 28 years ago, and Congress, after hearings, came to the same conclusion. Even assuming *arguendo* that an administrative law judge in a Section 403 proceeding were to make findings based upon testimony elicited in such a proceeding, what would be the result of those findings? The Commission has no jurisdiction over Arbitron and cannot order Arbitron to change its methodology or to suspend the use of PPM.⁴⁷ The Commission cannot order citizens to participate or not participate in PPM panels, nor can it require that panels contain specific racial, ethnic, or other compositions. Even if it were determined that PPM is "unreliable," the Commission could not act to remedy that problem.
- The Commission's lack of expertise and ability to act is markedly in contrast to the expertise of the entity that Congress determined should have authority in this area, to wit, the MRC, which is a privately-organized, industry-funded entity that was created following the Harris Committee's Report in order to perform exactly the role that the Harris Committee identified as appropriate. The MRC, through its staff, does have expertise and experience in media audience survey methodologies and expressly makes accreditation determinations for those methodologies. Moreover, the MRC's Voluntary Code of Conduct requires that an independent, professional auditing firm conduct a rigorous audit of a proposed new audience survey methodology, and present the auditor's report to the MRC prior to commercializing the new service. The audit can take up to six months in time and can cost several hundreds of thousands of dollars. The process is laborious, expensive, and exacting.

⁴⁷ As discussed below, the PPM methodology is in fact sound, and represents an improvement over the diary-based system for recording participant exposure to radio stations that PPM is in the process of replacing. Petitioners' fears of impending economic doom are ill-founded. Any discussion here with respect to the Commission authority or lack thereof should not be construed in any way as an admission by Arbitron that the Petition's description of PPM or its effects are correct.

- The Commission cannot somehow rescue the Petitioners from the consequences of financial harm that the Petition predicts, if PPM continues to be deployed. Even if the Commission were to find that PPM would “cause” advertisers to reduce their spending on particular categories of radio stations serving particular types of audiences,⁴⁸ the Commission has no authority to require those advertisers to make any expenditures, and in particular to make any expenditures to the benefit of those or of any other categories of stations or markets, or to otherwise ensure that such stations maintain historic revenue levels. Even if the unfounded rhetoric predicting the imminent demise of minority radio in the United States that is found in the Petition were true, the Commission cannot cure the circumstance that is described.
- The Petition appears to overlook the most fundamental aspects of the economic vitality of the Petitioners’ stations’ operations and the role of advertisers and audience measurement services. Advertisers seek to reach particular audiences, and look for those means of assuring that their messages will be exposed to those targets. There is nothing about PPM or its use which changes that fact. Both before and after the advent of PPM, advertisers have made and will continue to make expenditures on those stations that offer the opportunity to reach the target demographic segments that those advertisers are seeking. Neither advertisers nor audiences go away as a result of PPM. Moreover, advertisers and their advisers are generally sophisticated users of audience research – they know that any survey methodology has its limitations. They adjust for those limitations and take them into account. Indeed, as discussed in Section II.C.3 of these Comments, below, PPM was developed precisely to address advertiser concerns that the diary method has limitations, in part because it relies upon the diary-keeper’s memory and recordation practices, and is subject to faulty recall, bias, and error. That has not made the diary method “unreliable,” nor does it make advertisers foolish to the extent

⁴⁸ Of course, to state the obvious, PPM and the data that it produces do not compel or “cause” advertisers to take any action or to refrain from taking any action. Advertisers and their media advisors are independent actors, who consider not only data provided by Arbitron, but a range of other information in order to reach their own conclusions regarding whether and how to spend their advertising budgets, the targets of their advertising, and the media by which those targets may best be reached. The Commission has no authority to require advertisers to make particular decisions, or to refrain from doing so, or to explain the reasons for those decisions; the First Amendment prohibits the government from imposing controls based upon the content of speech, or based upon the uses to which those to whom the speech is directed may put the information communicated by that speech. Rather, the First Amendment establishes a general policy favoring the free flow of information.

One of the Petitioners’ members – Univision Communications, Inc. – made a similar effort to prevent Nielsen Media Research, Inc. (which performs a similar service as Arbitron, except for television stations and their viewers, rather than for radio stations and their listeners) from changing its audience ratings methodology, on the grounds of the purported negative effect of the changes upon minority-targeted television stations and their audiences. That attempt was soundly rejected, in part on the basis of the First Amendment. *Univision Communications, Inc. v. Nielsen Media Research, Inc.*, No. BC316833, 2004 WL 3050799 (Cal. Superior Court, July 7, 2004) (denying Univision’s motion for a preliminary injunction).

that they have used, and continue to use, diary-based audience estimates, knowing the attendant limitations. Advertisers will not be more foolish (nor will radio stations be less able to market the virtues and reach of their programming and its embedded advertisements), simply because PPM has been introduced as a more advanced methodology for surveying audience behavior than the diary. Petitioners' fears ultimately reflect the concern that some stations will not adapt to the new methodology of PPM, even as advertisers and their station competitors do. The Commission, however, has no mandate or authority to protect a given station's past or current revenue expectations or market share.

2. The requested process is the wrong process

The Petitioners not only seek to have the Commission initiate an investigation, but there is a suggestion in the Petition that the investigation should include participation by the Petitioners and perhaps others. That would transform the Section 403 inquiry into a multiple-party proceeding that could provide the Petitioners with information to which they might not otherwise have lawful access. To that extent, the request looks toward an abuse of the Commission's authority, designed for the Petitioners' private benefit, and cannot be countenanced.

The Commission's precedents are clear that an investigation, if initiated, is for the Commission's benefit. The investigation record provides information for the Commission's use in its formulation of policy and regulation. There is only one party to a Section 403 investigation, and that party is the Commission itself.⁴⁹ It is the Commission which determines what information to seek, and how it should be obtained.

⁴⁹ The Commission has expressly held that "there are no parties other than the Commission in an inquiry instituted pursuant to Section 403 of the Communications Act, as amended." *Inquiry into Alleged Abuses of the Commission's Processes by Applicants for Broadcast Facilities*, 4 FCC Rcd 1568 (1989), ¶ 4 (citing, *inter alia*, *Local TV Programming*, 24 Rad. Reg. (P&F) 782 (1963); *Domestic Telegraph Service*, 24 Rad. Reg. (P&F) 956 (1963); *Payola Inquiry*, 39 Rad. Reg. 2d (P&F) 1632 (Admin. L. Judge, 1977), *aff'd*, 42 Rad. Reg. 2d (P&F) 847 (1978); and *Inquiry* (continued...)

The Petition seems to suggest that the Petitioners be granted subpoena power and that they be granted the right to examine and cross-examine witnesses. In the Petition, PPM's adversaries seek unbridled discovery and access to Arbitron's commercially-sensitive and proprietary information. The Petitioners may hope to use that information, or the mere threat that it can be obtained involuntarily from Arbitron in the course of a Section 403 inquiry, as a lever to negotiate concessions from Arbitron, as the vendor of data regarding their stations' audience estimates; or they may hope to find some nuggets of information that can be used in private litigation seeking to enjoin the future lawful deployment of PPM.⁵⁰ There is no justification for the Commission, whose charter is to protect the public's interest, to initiate an investigation to the extent that it may be misused for the benefit of private parties.⁵¹

The inquiry which the Petition seeks is simply the wrong process and the wrong forum in which to address the concerns that the Petitioners raise. Throughout the development of the PPM service, Arbitron has listened to the concerns of the stakeholders, stations, advertisers, advertising agencies, the MRC, and others. Arbitron has adjusted its practices and methods in order to address issues regarding the recruitment and selection of PPM panelists, sample size and representativeness, and other aspects of this new technology. And as explained more fully in Section II.C.2 of these Comments, below, Arbitron has worked carefully and

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regarding Southern Bell Telephone and Telegraph Company and Southwestern Bell Telephone Company, 69 FCC 2d 1234 (1978)).

⁵⁰ Such litigation has been used in an effort – properly rejected by the courts – to prevent Nielsen Media Research, Inc. from deploying a new television audience survey technology under circumstances similar to Arbitron's deployment of PPM. *See Univision Communications, Inc. v. Nielsen Media Research, Inc.*, No. BC316833, 2004 WL 3050799 (Cal. Superior Court, July 7, 2004).

⁵¹ *See Stahlman* discussed at note 45, *supra*.

thoughtfully with the MRC through the MRC's confidential accreditation process, in order to address the MRC's concerns about PPM.

In derogation of that cooperative effort, which is and has been ongoing, the Petitioners seek to impose an adversarial process that risks (1) diverting the time, attention, and resources of Arbitron, its executives, and its key research and technology experts from exploring refinements to PPM into searching for documents that must be produced under subpoenas *duces tecum* and preparing their testimony, and (2) discouraging innovation, for fear that adversaries will argue that each improvement in PPM constitutes a tacit concession that the pre-improvement methodology was somehow inadequate. The Commission should not freeze the parties into a confrontational posture by initiating a Section 403 proceeding, when PPM is being adjusted and refined in light of many factors. That process continues with and through the MRC, even now.⁵²

Because the Petitioners are relatively more content with the data produced by the diary method than they are with the data produced by PPM, the Petition ignores advantages that PPM presents. The radio industry is in fierce competition with other media platforms, such as on-line, television, and outdoor, that have themselves already migrated, or that are in the process of migrating, to passive, electronics-based recordation of consumer exposure to encoded information that includes advertising messages, similar to PPM. If the Petitioners' apparent goal of ultimately sidetracking PPM were to succeed, Arbitron fears that the radio industry will be in

⁵² The possible perversion of the Commission's investigatory authority, in order to serve the private ends of the Petitioners, would itself bar granting the Petition. If the Commission has a proper basis for any action, *e.g.*, its concern that minority ownership and diversity in broadcasting be fostered, it could, as it did in its earlier consideration of media audience ratings issues, *see* the text of these Comments at Section II.A.3, *supra*, and accompanying notes 35-37, refer the matter to its staff, or solicit appropriate reports of actual experience with PPM. In that way, the Commission would have before it not the Petitioners' fears, but substantive data based on actual experience, showing over time whether advertisers and stations have adapted to the use of PPM data.

danger of being left behind, to the detriment not only of minority-owned and/or minority-oriented radio stations, but of all radio stations.⁵³ A relatively-limited number of vocal and politically-influential radio station owners and their allies who comprise the Petitioners thus threaten to hijack a new and promising innovation, whose disruptive effects are not unpredictable and can be managed, in a manner that could endanger the future well-being of the entire radio broadcasting industry. Into these areas, for the reasons set forth above, the Commission may not venture as a matter of its limited authority, and should not venture as a matter of sound policy.

C. The Petition Is Replete with Misstatements of Significant Facts, Unsupported Speculation, and Overheated Rhetoric, and Does Not Present a Valid Basis for Commission Action

The Petition, in a fit of near hysteria, posits that “[i]mplementation of a flawed PPM methodology would drop a financial nuclear bomb on America’s minority radio stations,”⁵⁴ and on the basis of that rhetoric – not on the basis of verified facts, documentation, or credible criticism of research methodology – urges the Commission to initiate an inquiry into the operations of a company – Arbitron – that the Petitioners themselves appear to admit is

⁵³ A study conducted for the Radio Advertising Bureau by Forrester Consulting in 2005 entitled “Economic Impact Study of the Portable People Meter” indicated that “In a future with PPM fully deployed, we estimate radio revenues will be \$696 million per year higher than they would be with diaries,” Slide No. 62, and that “If diaries remain the ratings methodology, radio will generate \$282 million less revenue per year (averaged),” Slide No. 51. The significance of this could hardly be overstated. In contrast to the completely undocumented projection in the Petition that the continued deployment of PPM “could” result in a loss of \$500 million in revenues for minority-owned radio stations, *see* note 61, *infra*, which – as shown in that footnote – presents a figure conjectured by one of the Petitioners without support, the Forrester Consulting report was prepared by independent, outside consultants for the benefit of a radio industry organization (albeit the study was funded by Arbitron). The Forrester Consulting report concludes that without PPM, the radio industry stands to lose out on nearly \$300 million in revenues that it currently receives, and that with PPM, the industry stands to gain nearly \$700 million in revenues that it does not currently receive, some portion of which will clearly be enjoyed by minority-owned and minority-targeted stations.

⁵⁴ Petition, at 11.

beyond the Commission's jurisdiction to regulate.⁵⁵ As shown below, an examination of only a few of the allegations and misplaced argumentation that lie at the very heart of the Petition demonstrates that the Petition cannot support the extreme measures that it demands. Even if the Commission had jurisdiction and authority to undertake the requested Section 403 investigation (which, as demonstrated above, it does not), the Petition must be denied.

1. Predictions of Disaster for Radio Stations that Target Minority Audiences Have Not Proven Correct in Actual Experience

The Petition argues that the mere introduction of PPM will necessarily result in the extinction of minority-owned and/or minority-oriented radio stations.⁵⁶ The actual experience with PPM in markets where it has already been in commercial implementation is otherwise.

In Houston, two Urban-formatted radio stations (KBXX-FM and KMJQ-FM) that are owned by Radio One, the largest African-American-owned radio station group owner in the United States, were perennial ratings leaders in the diary service. In the Winter, 2008 survey, which was the last diary report released in Houston, KBXX-FM and KMJQ-FM ranked Numbers One and Three, respectively, in the market for Average Quarter Hour ("AQH") Persons, aged

⁵⁵ Petition, at 15:

To the extent that the Commission lacks jurisdiction to regulate a non-licensee such as Arbitron, the Commission's jurisdiction under Section 403 to learn the facts about recurring and policy-impacting relationships between licensees and non-licensees has been settled for three generations.

Putting aside the issue of the Commission's jurisdiction under Section 403 (*see* Section II.A of these Comments, *supra*), the opening phrase of the quoted sentence all but concedes that the Commission lacks jurisdiction to regulate Arbitron.

⁵⁶ Petition, at 12:

Absent corrective measures, the nationwide rollout of PPM could decrease minority radio stations' annual revenues by as much as

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twelve and over, between the hours of 6 AM and Midnight, Monday through Sunday, which is the “total week” daypart. When Houston first converted to the PPM-based ratings currency in June of 2007, these two stations initially experienced declines in their market rankings, falling to Numbers Six and Eight, respectively. But by June of 2008, after those stations had implemented several well-publicized changes in their programming and promotion practices – but not changes in their basic station formats – these same two stations climbed back to become the first- and second-ranked stations in the Houston market. Simply put, station management used the new PPM data to identify opportunities to attract and hold listeners to the stations, responded to the new measurement instrument, and competed successfully in the marketplace.

Similarly, KLOL in Houston has ranked as the Number One Spanish-language station among listeners of twelve years of age and older for six of the last ten PPM monthly reports, according to a recent article in *R&R Latin*.⁵⁷ According to data maintained by Arbitron, in the diary-based reports for the Winter, Spring, Summer, and Fall of 2006, and for the Winter of 2007 (which was the last diary-based report released for Houston), KLOL was ranked as the Number Three Spanish-language station in Houston. Thus, the PPM-based reporting witnessed an improvement in KLOL’s market ranking among its Spanish-language competition from the ranking that the station held prior to PPM’s arrival.

Other minority-oriented or minority-owned radio stations have successfully retained high market ranking positions for key audience demographics during the conversion

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\$500,000,000 *It would constitute the greatest loss of value in the history of minorities in broadcasting* (emphasis in original).

⁵⁷ “‘Mega’ Recipe for Success, How KLOL/Houston achieved rating success with the PPM,” Jackie Madrigal, *R&R Latin* (August 8, 2008).

from diary-based ratings to PPM-based ratings. Selected examples are listed in Appendix 2 to these Comments, covering a mix of markets, formats, age groups, and dayparts for eight radio stations in New York, Los Angeles, Chicago and San Francisco (Spring, 2008 diary as compared to August, 2008 PPM).⁵⁸

Appendix 2 establishes, for example, that in New York, Spanish Broadcasting System's WSKQ-FM, which features a Spanish Tropical format, maintained its Number Four ranking for AQH Persons among Adults aged 18 to 34 between the hours of 6 AM and Midnight, Monday through Sunday, across both the Spring, 2008 diary and the August, 2008 PPM reports.⁵⁹ Clear Channel Communications' WWPR-FM in New York, whose format is Urban Contemporary, actually improved its market ranking for AQH Persons Adults 18-34 during those same hours from the Spring, 2008 diary (where it ranked Number Three) to the August, 2008 PPM (where it ranked Number Two).

Appendix 2 further establishes that in Los Angeles, Univision Communications' KSCA-FM, which presents a Mexican Regional format, maintained its rank as the fifth-rated station in the market for AQH Persons Adults 18-34 during the hours from 6 AM to Midnight, Monday through Sunday, from the Spring, 2008 diary to the August, 2008 PPM reports.⁶⁰ In

⁵⁸ Appendix 2 contains excerpts from Appendix 3. Appendix 3 sets forth additional information concerning the eight stations whose data are set forth in Appendix 2, and includes data for more stations in each of the four identified markets, as well as three other markets in which Arbitron intends to commercialize PPM on October 8, 2008.

⁵⁹ Spanish Broadcasting System is one of the Petitioners, and by its counsel, a separate signatory to the Petition. The Petition states that adults of all races aged 18-34 are one of the three demographic groups that are the "prime target audience" for stations that program to African Americans and Hispanics. Petition, at 24.

⁶⁰ Univision Communications is one of the Petitioners and, by its counsel, a separate signatory to the Petition.

Chicago, Spanish Broadcasting System's WLEY-FM, also a Mexican Regional-formatted station, improved its market ranking from the Spring, 2008 diary report (where it ranked Number Five) to the August, 2008 PPM report (where it ranked Number Three) for AQH Persons Adults 18-34 between the hours of 6 AM and Midnight, Monday through Sunday. In San Francisco, Spanish Broadcasting System's KRZZ-FM, also featuring the Mexican Regional format, likewise improved from a Number Five ranking for AQH Persons Adults 18-34 between 6 AM and Midnight, Monday through Sunday, in the Spring, 2008 diary report to a Number Four ranking in the August, 2008 PPM report.

The data set forth in Appendix 2 are the demonstrated experiences of minority-owned or minority-targeted stations in markets already using PPM, and those data expose the unwarranted speculation, undocumented assertion, and hyperbole that permeate the Petition.⁶¹

⁶¹ See, e.g., the quoted passage from the Petition at footnote 56, *supra*. The Petition cites, as support for its projection that the nationwide rollout of PPM could subtract Five Hundred Million Dollars from the annual revenues of minority radio stations, a publication issued by one of the Petitioners themselves, the Minority Media and Telecommunications Council ("MMTC"). Petition, at 12, n. 32. That publication is entitled "MMTC Road Map for Telecommunications Policy" ("Road Map") and is dated July 21, 2008. The Road Map is a policy advocacy piece that sets forth MMTC's recommendations for various regulatory and legislative initiatives that it believes would advance the interests of minorities in the media and telecommunications industries. The specific passage from the Road Map that is cited in the Petition for support for the Five Hundred Million Dollar projection, however, only echoes – virtually *verbatim* – the quoted passage in the Petition itself:

MMTC has calculated that absent corrective measures, the nationwide rollout of PPM would decrease minority radio stations' annual revenues by as much as \$500,000,000 It would constitute the greatest loss of value in the history of minorities in broadcasting.

Road Map, at 24. In fact, the only deviation from the Road Map to the Petition is the introduction of a slightly higher degree of uncertainty, the verbiage "would decrease" being replaced by the more contingent verbiage "could decrease."

In other words, the factual support for this breathtaking assertion – breathtaking in both the size of the number and its specificity – is nothing more than a self-reflecting mirror, with the Petition quoting as support for its projection one of the Petitioners' own members' "calculations" that in turn lack any documentation or support.

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The Petition lacks any supporting affidavits or declarations from experts or others purporting to be knowledgeable as to the matters of fact that are asserted, whereas the assertion of facts in Subsections 1, 2, 3, and 4 of this Section II.C of Arbitron's Comments (other than matters of which official notice may be taken by the Commission or which are separately documented by citation) are fully documented and supported by the declaration under penalty of perjury of Robert Patchen, Arbitron's Senior Vice President and Chief Research Officer, whose career has been spent in the field of survey research as more fully described in his declaration.⁶² That simple difference alone – supported facts drawn from actual market experience and backed by a knowledgeable expert in the field, contrasted to unverified and unsupported projections that appear to partake more of hysteria than of demonstrable fact – clearly reveal that the Petition's assertions are largely fog and smoke, which cannot support the relief requested.

The words of Oscar Romero, the Program Director at KLOL in Houston – whose success in understanding and making use of the higher level of granularity, timeliness, and accountability of PPM were recounted in the *R&R Latin* article previously mentioned⁶³ – summarize the true conditions “on the ground” in the highly-competitive radio industry as well as anything: “PPM is not a mega, crazy change that's going to ruin how we do radio.”⁶⁴ Also

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Independent studies, *see* the Forrester Consulting report, *supra* at n. 53, establish that with PPM, revenues will actually increase by more than the unsupported projection postulated by Petitioners, and there is every reason to expect some of the increased dollars would be targeted to reach minority audiences.

⁶² Mr. Patchen's Declaration is appended to these Comments as Appendix 4.

⁶³ *See* note 57, *supra*, and accompanying text.

⁶⁴ “‘Mega’ Recipe for Success, How KLOL/Houston achieved rating success with the PPM,” Jackie Madrigal, *R&R Latin* (August 8, 2008).

instructive is the following quotation from Alfred Liggins III, the Chief Executive Officer of Radio One:

Electronic measurement is providing compelling evidence about the power of Urban radio to reach and engage the African-American consumer. It is also demonstrating the “working persons” advantage that Urban radio offers marketers who want to reach the brand-conscious and brand-loyal African-American consumer.⁶⁵

The overblown rhetoric of the Petition notwithstanding, PPM represents an opportunity for minority-owned and minority-oriented radio stations to keep pace with, or even to advance beyond, the market ranking positions that they have historically enjoyed under the diary.⁶⁶ Our nation is not, contrary to the Petitioners, on the brink of a “nuclear” annihilation of minority radio, and the continued commercialization of PPM will not bring about such a catastrophe.

⁶⁵ Radio & Television Business Report, October 16, 2007.

Likewise, a recent article in *R&R Rhythmic* explained how rhythmic-formatted WRDW in Philadelphia, known as “Wired 96.5,” initially saw its morning program drop from Number Two in the diary to Number Thirteen, after the PPM data were first published. The station’s program director explains in the article that certain adjustments were made to the morning show host’s on-air performance, and as a result the morning program grew in audience among adults in the 18-34 age group to Number Three. See “Prospering in a PPM World,” Darnella Dunham, *R&R Rhythmic* (September 12, 2008).

⁶⁶ The change from the diary-based reports to the PPM-based reports does require stations to re-examine their approach to their programming, and to make appropriate adjustments. And it is not just minority-targeted stations that are affected. As reflected in the testimony given to the New York City Council earlier this month by Steve Morris, the Chairman, President, and Chief Executive Officer of Arbitron, WABC – a “talk”-formatted radio station in New York that features such on-air personalities as Rush Limbaugh and Sean Hannity, has an audience that is 89% comprised of persons who are neither African-American nor Hispanic. The July, 2008 PPM ratings for adults aged 25 to 54 for WABC are only 40% of those reported by the diary. That represents a reduction in the station’s largely Caucasian audience of 60%. See Testimony of Steve Morris, Chairman, President, and Chief Executive Officer of Arbitron, as prepared for delivery to the City Council of the City of New York on September 10, 2008, at Page 3.

2. To the Best of Arbitron's Knowledge, PPM is the Only New Radio or Television Currency Ratings System in History to be Accredited by the MRC Prior to Commercial Deployment

As discussed in these Comments, *supra*, in Section II.A.3, Congress after full hearings reported its view that ratings methodologies should not be regulated by the Commission, but should be left to a private-industry solution. The MRC was created to fill that role, and has over many years developed expertise and industry credibility in its accreditation process. Arbitron has cooperated fully with the MRC accreditation process for PPM from the start. In the case of the Houston PPM service, Arbitron waited two years after establishing the PPM panel before commercializing, in large part in order to complete the MRC accreditation process and to win accreditation for the service. (Arbitron was not, however, required to do so, under the terms of the MRC's Voluntary Code of Conduct, which only requires completion of an independent MRC audit and illumination of the audit findings with MRC committees comprised of broadcasters, advertisers and advertising agencies.⁶⁷) By delaying in Houston, Arbitron

⁶⁷ While the MRC's Voluntary Code of Conduct expresses a preference that new ratings methods be accredited prior to commercialization, it only requires an audit and illumination for a very sound reason: changes in ratings methodologies can create tensions in the affected broadcasting industries, because shifts in ratings data require stations and advertisers to adapt to the newer systems, creating the possibility that more nimble or astute stations will move up in ratings, while those who fail to adapt will drop. The MRC members who vote to grant or to deny accreditation often have an actual or potential economic conflict of interest in the outcome of accreditation votes. For example, at least three of the Petitioners actually vote and actively participate in other ways in the MRC's accreditation process for PPM, and a representative of one of those Petitioners, who serves as Chair of the MRC Board of Directors, is a senior executive at Univision Communications, Inc. That individual actually went so far recently in public testimony to suggest that Arbitron's PPM-derived data may be intentionally distorted: "These [PPM] estimates become the currency with which radio is bought and sold. Spanish radio will not continue to exist if our currency is counterfeit." (Testimony of Ceril Shagrin, Executive Vice President of the Corporate Research Division of Univision Communications, Inc., as prepared for delivery to the City Council of the City of New York on September 20, 2008, at Page 3.) The shockingly-irresponsible suggestion that Arbitron's PPM data are "counterfeit," coming from the current MRC Chair, demonstrates the challenges that Arbitron faces in obtaining final MRC accreditation.

(continued...)

became the first company in history, to the best of its knowledge, to wait for accreditation before commercializing.

The Petition makes much of the fact that the MRC has thus far denied accreditation to PPM's "Radio First" service in Philadelphia and New York.⁶⁸ The Petition selectively quotes the testimony of George Ivie, the MRC's Executive Director and Chief Executive Officer, at the Commission's July 29, 2008 *en banc* hearing on Overcoming Barriers to Communications Financing, held at the Schomburg Center in New York. A fair review of Mr. Ivie's full testimony discloses that: (1) Mr. Ivie testified that "... a broad industry consensus exists that electronic measurement such as that enabled by Arbitron's PPM technology is a significant step forward in terms of capturing listener exposure," and that while electronic measurement is not perfect, "... it is broadly considered better than the current hand-written, recall-based diary technique when implemented properly;"⁶⁹ (2) Mr. Ivie further testified that the two techniques – diary versus PPM – do measure differently, and "... therefore audience changes do occur *purely as a result of measurement mode*;"⁷⁰ (3) Mr. Ivie testified that while the

(...continued)

By contrast, the audit and illumination of a new ratings service is performed by a wholly independent audit firm; in the case of PPM, that firm is Ernst & Young. This process allows the major users of the ratings data – the broadcasters, advertisers, and advertising agencies – to benefit from a thorough examination of the new ratings methodology, so that they have the facts about how the new system functions, but does not require their vote of support for the new system. Only the final accreditation step requires a majority vote of the MRC members.

⁶⁸ Petition, at 6-7.

⁶⁹ Statement of George Ivie, Executive Director and Chief Executive Officer of the Media Rating Council, Inc., Federal Communications Commission's *En Banc* Hearing, "Overcoming Barriers to Communications Financing," July 29, 2008, Schomburg Center, New York, New York, at 5.

⁷⁰ *Id.* (emphasis added). The Petition ascribes the reported fall-off in the estimated audiences of certain minority-owned or minority-oriented stations between the diary and PPM as owing to various alleged "flaws" in several aspects of PPM, such as supposed problems with panelist recruitment, sample representation, and panelist compliance, Petition at 22-30, without ever acknowledging that Mr. Ivie – as the spokesperson for the organization that has the greatest

(continued...)

MRC has “important ongoing concerns” with respect to the implementation details of PPM, “. . . Arbitron is actively trying to address these concerns and has publicly acknowledged that fact, . . . ;”⁷¹ and (4) Mr. Ivie specifically did not upbraid Arbitron for commercializing the “Radio First” PPM system in New York, Philadelphia, or the other markets that are scheduled for commercialization on October 8, 2008, prior to achieving MRC accreditation.⁷²

The selective excerpting of Mr. Ivie’s testimony is consistent with the Petition’s insistence on argumentation instead of facts.⁷³ While the Petition has the luxury of not letting

(...continued)

expertise in this area – made it clear that such differences are caused in part by differences in the technologies themselves.

⁷¹ *Id.* at 5.

⁷² Mr. Ivie also testified to the MRC’s desire to maintain Arbitron’s “un-diverted attention” to the issues that the MRC has raised with respect to the accreditation of the “Radio First” methodology. *Id.* at 7. This again underscores why, as more fully set forth in Section II.B.2 of these Comments, the Commission should not force Arbitron into an involuntary Section 403 inquiry that would, most assuredly, “divert” Arbitron’s attention from addressing the issues that the MRC has identified.

⁷³ The Petition emphasizes a resolution adopted by the Commission’s Federal Advisory Committee on Diversity for Communications in the Digital Age (the “Advisory Committee”) on July 28, 2008, recommending that the Commission initiate an investigation under Section 403. It is not clear that the resolution is properly within the range of matters to be considered by the Advisory Committee under its charter, but even assuming *arguendo* that the Advisory Committee could properly advise the Commission with respect to investigative responsibilities, the circumstances of the resolution’s adoption establish that it is entitled to virtually no more weight than the Petition itself.

The resolution was adopted by a vote in which eight Advisory Committee members present voted in favor, three opposed, and two abstained. Three of the votes in favor of the resolution’s adoption were cast by Advisory Committee members who are representatives of certain of the Petitioners. The Federal Advisory Committee Act (“FACA”), for statutory advisory committees, requires that the charter of the committee must “assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by . . . any special interest, but will instead be the result of the advisory committee’s independent judgment” 5 U.S.C. App. 2 § 5(b)(3). The regulations promulgated under FACA impose the same obligation. They require any agency head to “develop procedures to assure that the advice or recommendations of advisory committees will not be inappropriately influenced by . . . any special interest, but will instead be the result of the advisory committee’s independent judgment.” 41 C.F.R. § 102-3.105(g). While the Commission apparently has determined that each of the members of the Advisory Committee is a “representative” of one or more interested groups, the Commission cannot avoid its

(continued...)

facts interfere with the Petitioners' hyperbole, the Commission is bound by a standard that will not allow arbitrary or unsupported action.

3. PPM Does Not Change the Audience Measurement Objective for Arbitron's Surveys, which (like the Diary) is to Measure Exposure to Radio Programs and Advertising, not Listener Loyalties or Preferences

In the 1980's, the radio industry debated the proper way to define the total audience to a given radio station: should the definition of "audience" include only those people who report actively "listening to" the station; only those who personally choose the station; only those who "liked" the station; or, only those who are exposed to the station, that is, anyone who could hear the program or advertisements in question?

After much study and consultation, the National Association of Broadcasters ("NAB") recommended to Arbitron that the radio audience definition should be based upon whether a person could "hear" the radio station in question. There should be no requirement for "actively listening to" or any other form of perceived engagement preference. The NAB's Committee on Local Radio Audience Measurement, known as "COLRAM," worked directly with Arbitron to craft an updated diary design and diary instructions that were worded to stress this point: "*'Listening' means any time you can hear a radio – whether you chose the station or not.*" Those instructions, and the audience definition based upon "hearing" the radio, were

(...continued)

responsibility to assure independent judgment on the part of the Advisory Committee. Where, as here, members of the Advisory Committee recommending action are themselves signatories to the Petition, the Commission must discount the significance of the recommendation, at least to the extent of acknowledging that just as many member of the Advisory Committee who were present at the July 28, 2008 meeting did not vote in favor of the adoption of the resolution as those who did. Transcript of Meeting of the Federal Communications Commission's Advisory Committee on Diversity for Communications in the Digital Age, July 28, 2008, Barnard College, New York, New York, at 101.

adopted in 1988 and have been in force ever since. What PPM does is provide an objective, passive, electronics-based – and hence, more valid – technique for measuring and recording exposure, in comparison to the diary, which is known to be subject to risks that it will reflect conscious or unconscious deviation from actual exposure, due to the diary-keeper’s mistakes in recall, delays or biases in recording her or his actual hearing experiences, and other forms of subjective criteria.⁷⁴

The development of the PPM since inception in 1993 has been guided by this basic goal: to passively and electronically detect and report audible exposures to any encoded

⁷⁴ Data previously submitted voluntarily to the Commission by Arbitron bear this out. *See* Letter to Monica Desai, Chief, Media Bureau, from Timothy T. Smith, Arbitron’s Executive Vice President and Chief Legal Officer, dated August 22, 2008, and specifically Attachment 3 to that letter, entitled “Differences Between Diary-Based and Electronic Measurement.” There follows an instructive excerpt from that Attachment:

To explore the differences in listening results that are seen between PPM and Diary, we conducted a test in Philadelphia. In this test, we sent former PPM panelists a weekly radio diary to record their listening. The listening that this sample reported in their diaries was compared to their listening as reported by their PPM devices one year earlier. Since this comparison was for the same people, differences in sample representation could not be driving any of the listening differences seen. When comparing diary and PPM results for the same people, the same patterns of differences between PPM and Diary are seen.

- The PPM data showed 72% more episodes of radio listening each week than reported in the diary (28.5 versus 16.6) but each listening episode was roughly half as long as reported in the diary (36 minutes versus 83 minutes)
- The PPM showed about twice as many stations as reported in the diary (6.3 versus 3.1)
- The PPM showed listening start times that were spread equally across the clock quarter-hours, compared to the diary data in which nearly half (45%) of the episodes started at the top of the hour.

radio source. Extensive laboratory experimentation and real-world tests conducted by Arbitron and by independent, expert reviewers (including the auditors at Ernst & Young) have established that PPM detects and credits audible exposures to radio stations in a manner consistent with this long-standing industry definition of the total audience to a radio station.

The Petition takes PPM to task for failing to include “a metric for listener engagement and loyalty.”⁷⁵ The simple answer is that that is not, and has not been, the purpose of either the diary or PPM. By focusing on the objective recordation of exposure, PPM gives the broadcasting and advertising constituencies what they requested two decades ago. This is not to say that listener loyalty is irrelevant to the marketability of stations; it is simply to say that such subjective characteristics as engagement and loyalty are not within the scope of either the diary’s or PPM’s stated task.⁷⁶

⁷⁵ Petition, at 31.

⁷⁶ The Petition actually suggests that advertisers prefer subjectively-influenced diary reporting, precisely because it lends itself to over-reporting of favored radio stations by “loyal” or “engaged” listeners, in comparison to objective exposure data:

It is ironic that one of the principal methodological limitations of PPM stems from a key design flaw in another Arbitron product, the diary. This attribute of diaries is the least well-kept secret in the advertising world. Advertisers understand that diary over-reporting happens, and that it reflects loyalty, which happens to be an attribute that advertisers highly value. Advertiser acceptance of diary ratings with over-reports that embed loyalty is what makes it possible for Arbitron to continue to offer its diary product and assert its credibility. It doesn’t measure what Arbitron says it measures, but what it does measure is what advertisers crave.

Petition, at 32, n.86.

Apart from the fact that the statements about what “advertisers crave” is totally unsupported by any evidence that advertisers prefer less-accurate data precisely because the inaccuracies supposedly “embed” the subjective feature of “engagement” or “loyalty” – a rather startling assertion whose very boldness cries out for some such support – the quoted footnote runs entirely counter to the purpose of radio station audience measurement as agreed upon by COLRAM and Arbitron.

4. Minority and Young Adult Representation Are as Good or Better in PPM Samples as in Arbitron's Diary Survey

The Petition repeatedly cites alleged “flaws” in the PPM sampling and panel management methodology as likely causes of the ratings differences observed for some minority-owned or minority-oriented stations between diary-based results and PPM-based results.⁷⁷ The facts are markedly in contrast to the allegation: the PPM samples effectively represent Black and Hispanic persons, including young adults in the 18-34 age group, and in many cases the PPM sample indexes higher than the diary on these comparisons. This holds up across several important factors beyond age, including geographic location and language preference (English-dominant and Spanish-dominant) within the overall Hispanic sample.

Table 1 below provides a summary of these sample composition comparisons for the New York Radio Metro in the form of “proportionality indices.” The proportionality index compares the percentages of the usable or “in-tab” sample for the PPM panel (August of 2008) and for the most recent diary survey in New York (Winter of 2008) to the percentages for each segment of the population:

⁷⁷ Petition, at 22-26, 28-29.

Table 1
Proportionality Index by Sample Type, PPM versus Diary
New York Radio Metro (excludes Nassau-Suffolk and Middlesex-Somerset-Union)
(Winter, 2008 Diary versus August, 2008 PPM)

	Diary (Persons 12+)			PPM (Persons 6+)		
	Pop %	In-tab %	Index	Pop %	In-tab %	Index
Sample Type						
Black Persons**	19.5	19.9	102	20.0	20.0	100
Hispanic Persons**	23.0	20.2	88	23.7	31.3	132
Total Persons 18-34	26.7	21.6	81	24.4	23.1	95
Black Persons 18-34	5.4	4.8	89	4.9	4.3	88
Hispanic Persons 18-34	8.0	6.0	75	7.3	9.4	129
Spanish-dominant Hispanics**	14.3	11.4	80	13.3	17.2	129
English-dominant Hispanics**	8.7	8.8	101	10.4	14.1	136

How to read: For PPM, 20.0% of total Persons 6+ (meaning Persons aged six and over) in the Arbitron-defined New York Metro is Black, and 20.0% of the PPM average daily in-tab (usable tabulated) sample is Black, yielding a perfect Proportionality Index of 100.

Hispanic Persons aged six and over (“6+”) comprise 23.7% of the New York Metro population, but they comprise 31.3% of the PPM average daily in-tab sample, yielding a Proportionality Index of 132. This means that Hispanics are actually over-represented in the PPM panel and must be weighted down to align with their population percentage.

**Proportionality Index = (In-tab sample %, expressed as a percentage of the Population %) x 100.*

***Diary = Persons 12 years of age and older (“12+”); PPM = Persons 6 years of age and older (“6+”)*

Hence, when the Petition argues that “Young African American and Hispanic listeners are not adequately included in Arbitron PPM samples,”⁷⁸ the argument is simply wrong.

The Petition further assails the PPM sampling methodology because it is based upon random selection of telephone numbers and includes a cell-phone-only (“CPO”) sample target of 7.5%, whereas the number of CPO households is higher than 7.5%, especially among

⁷⁸ Petition, at 24.

minorities.⁷⁹ The implication is that the diary method, which the Petitioners seem to prefer to PPM,⁸⁰ is superior to PPM on this criterion. However, the diary and PPM telephone sampling procedures are nearly identical. The only practical difference is that the PPM sampling process includes CPO households, while the diary sample does not provide any such coverage. Again, this purported sampling “issue” cannot explain the reported fall-off in published audience estimates for minority-owned or minority-oriented radio stations from the diary to PPM. If anything, the PPM CPO sample group shows comparatively-high indices for persons of color who may be likely listeners to such radio stations, as summarized in Table 2:

Table 2
Share of Diary and PPM Samples Comprised of Persons Residing in CPO Households, by Sample Types

New York Radio Metro

<u>Sample Type</u>	<u>Diary CPO</u>	<u>PPM CPO (June, 2008)</u>
Total	None	6.9%
Black	"	6.9%
Hispanic	"	17.1%
Spanish-dominant Hispanics	"	22.0%
English-dominant Hispanics	"	11.7%
Persons 18-34	"	14.3%
Blacks 18-34	"	9.8%
Hispanics 18-34	"	26.8%

⁷⁹ Petition, at 24-26.

⁸⁰ Petition, at ii (“The filing of this Emergency Petition should not be misread as a sign of no confidence in Arbitron’s diary or specialized research products, . . .”).

The Petition also cites purported “flaws” in the PPM panel execution that are supposedly related to failures to gain cooperation from young adults aged 18-34, including minority young adults.⁸¹ However, here again the facts speak differently. The PPM panel results suggest better cooperation, as compared to the diary survey, among these groups. The PPM daily “persons in-tab rate” requires proof of compliance with the task of carrying or wearing the meter by the panelist. The evidence, based upon a motion detector that is built into the meter, proves that in-tab panel members wear the device on average 14-15 hours per day overall, and that roughly 75% overall meet the daily requirements for in-tab inclusion. This is a higher percentage than the percentage of diary participants who return their diaries to Arbitron. For example, as shown in Table 3, in New York less than 60% of total persons 12 years of age or older in the last diary survey (Spring of 2008) who agreed to accept diaries actually completed and returned a usable diary; that number was less than 50% for Black and Hispanic persons aged 12 and older.

Table 3
Comparison of Diary and PPM Compliance Rates
Diary Return Rate (Winter, 2008) versus PPM Daily In-tab Rate (June, 2008)

New York Radio Metro

<u>Sample Type</u>	<u>Diary Return Rate*</u>	<u>PPM In-tab Rate*</u>
Total	57.6%	77.0%
Black	49.2%	71.3%
Hispanic	44.1%	77.1%

**Among those who agree to accept diaries or join the PPM panel. Diary sample = Persons 12 years of age and older, PPM = Persons 6 years of age and older.*

⁸¹ Petition, at 29-30, 35-37.

The diary “compliance rate,” as measured by the return rate after the end of the survey week, is lower than the daily PPM in-tab rates. In fact, a diary keeper may complete his or her diary a week or more after the end of the survey period (based completely on memory that is then several days removed from the experience to be recorded), and still be included in the in-tab sample for the survey. It is therefore contrary to fact to contend, as the Petition does,⁸² that individuals comply better with the diary survey tasks than they do with PPM tasks.

This review of actual experience and actual data underlying the PPM methodology and its panels establishes that the Petition is simply unreliable in its recitation of information. The Petition is more commonly at war with, than in alignment with, demonstrable facts, it is based upon unverified allegations and speculations, and it reaches conclusions that at best exaggerate and at worst misstate the true circumstances attendant upon this matter. The Petition is not entitled to the credence that the Commission must demand when asked to take action that would have the Commission exercising authority that it does not possess and attempting to make recommendations concerning an entire universe of commercial activity in which it possesses neither experience nor expertise. It would be arbitrary, capricious,

⁸² Petition, at 35:

... there is little or no congruency between PPM and diary rating points and market rankings, especially for minority broadcasters, ... much of this disparity may be attributed to low carry rates by young adults 18-34, a demographic with a much higher percentage of people of color. The PPM recording device must be carried at all times. To many, it is inconvenient, unattractive, and cumbersome, and thus it may be skewing the rating numbers.

Simply put, the data contained in Table 3 are facts, whereas the speculations contained in the quoted passages from the Petition (“... much of this disparity *may be* attributed ...” and “... thus it *may be* skewing ...”) fall into the realm of conjecture.

unreasonable, and an abuse of the Commission's discretion to rely upon the assertions in the Petition.

III. CONCLUSION

The Commission has no direct authority to initiate the investigation that the Petition advocates, because the Commission lacks jurisdiction over Arbitron and Arbitron's business. The Commission's ancillary jurisdiction does not extend any greater reach, because there is no direct regulatory authority to which any such ancillary jurisdiction can be tied. Even if the Commission had jurisdiction, it should not grant the Petition, because the requested process is the wrong process and cannot lead to any orders or results that would provide relief to the Petitioners. On the contrary, the requested investigation would actually forestall the continuation of an ongoing process of dialogue between Arbitron and its customers and related improvements in PPM technology. While the Commission has authority to vindicate the public interest, the Petitioners seek to turn that authority to their private benefit and to pervert the Commission's investigative authority into an unauthorized discovery tool. The Commission should not countenance that effort.

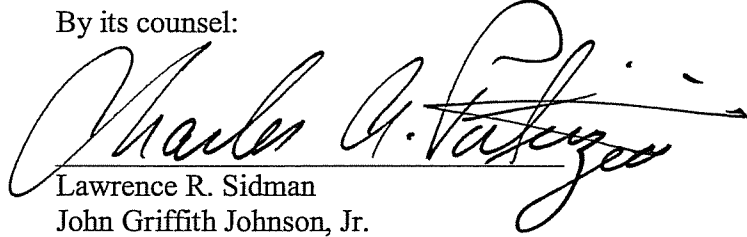
The Petition is based upon false premises regarding PPM and ill-reasoned projections of negative effects that are not consistent with actual experiences of minority-owned and minority-oriented stations in markets where PPM has been deployed. Throughout the commercialization of PPM, to Arbitron's knowledge, no station has actually been "annihilated" by the PPM-based reports.

For all these reasons, the Petition should be denied.

Respectfully submitted,

ARBITRON INC.

By its counsel:

A handwritten signature in cursive script, reading "Charles A. Patrizia". The signature is written in black ink and is positioned above the printed name and address.

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September 24, 2008

Appendix 1

Letter from Roy J. Stewart, Senior Deputy Chief, Media Bureau, Federal Communications Commission, to Congressman Gene Taylor, dated March 20, 2008



Federal Communications Commission
Washington, D. C. 20554

March 20, 2008

IN REPLY REFER TO:
CN-0800334

The Honorable Gene Taylor
U.S. House of Representatives
701 Main Street
Suite 215
Hattiesburg, Mississippi 39401

Dear Congressman Taylor:

Thank you for your letter on behalf of your constituent, Mr. Vernon Floyd of Circuit Broadcasting Company, the licensee of several broadcast stations in the Laurel-Hattiesburg, Mississippi market. Mr. Floyd contacted your office regarding his concern that the practices and policies established by Arbitron to measure radio audiences does not accurately reflect the listeners of radio stations in the Laurel-Hattiesburg market which provide programming that is of interest to African American communities. I appreciate the opportunity to respond.

As you may know, Arbitron is a private and independently owned media and marketing research firm serving the radio and television industries, as well as advertisers and advertising agencies in the United States. The Federal Communications Commission relies on Arbitron data in processing various types of applications and in determining radio markets. Arbitron, however, is not regulated by the Commission. In addition, the rates and practices of the advertising industry are not subject to regulation by the Commission.

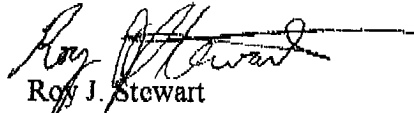
According to information available on the Arbitron website (www.arbitron.com), questions concerning the Laurel-Hattiesburg market should be directed to Ms. Judy McDowell, and Mr. Floyd may wish to contact her regarding this matter. Ms. McDowell may be contacted by telephone at (205) 879-6651.

Mr. Floyd also may wish to discuss his concerns with other African American broadcasters to determine whether they are experiencing similar problems with Arbitron's audience measurement methodologies. If so, Mr. Floyd may wish to consider contacting a group that advocates on behalf of minority broadcasters, and request that the group examine Arbitron's practices and policies. Two such non-governmental advocacy groups are the Minority Media and Telecommunications Council (www.mmtc.org) and the National Association of Black Owned Broadcasters (www.nabob.org).

Page 2—The Honorable Gene Taylor

I hope that this information is helpful to you and to Mr. Floyd. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy J. Stewart", with a horizontal line extending to the right.

Roy J. Stewart
Senior Deputy Chief
Media Bureau

Appendix 2

Selected Examples of "Top 5" Minority Stations as Ranked in the Diary and PPM
Services, by Market (Source: Appendix 3)

Appendix 2

Selected Examples of "Top 5" Minority Stations as Ranked in the Diary and PPM Services, by Market (Source: Appendix 3).

				Rank (AQH Persons)	
				Diary Sp08	PPM Aug08
New York					
Monday-Sunday 6AM-MID					
Adults 18-34	WWPR-FM	Urban Contemporary	Clear Channel	3	2
Adults 18-34	WSKQ-FM	Spanish Tropical	Spanish Broadcasting System	4	4
Monday-Friday 6AM-10AM					
Adults 18-34	WSKQ-FM	Spanish Tropical	Spanish Broadcasting System	4	5
Adults 18-34	WWPR-FM	Urban Contemporary	Clear Channel	5	2
Adults 18-49	WBLS-FM	Urban Contemporary	Inner City Broadcasting Corporation	5	5
Adults 25-54	WBLS-FM	Urban Contemporary	Inner City Broadcasting Corporation	3	4
Adults 35-64	WRKS-FM	Urban AC	Emmis Communications	4	1
Los Angeles					
Monday-Sunday 6AM-MID					
Adults 18-34	KSCA-FM	Mexican Regional	Univision	5	5
Adults 18-49	KSCA-FM	Mexican Regional	Univision	2	4
Adults 25-54	KSCA-FM	Mexican Regional	Univision	2	3
Chicago					
Monday-Sunday 6AM-MID					
Adults 18-34	WLEY-FM	Mexican Regional	Spanish Broadcasting System	5	3
Adults 18-49	WOJO-FM	Mexican Regional	Univision	2	3
Adults 25-54	WOJO-FM	Mexican Regional	Univision	3	3
San Francisco					
Monday-Sunday 6AM-MID					
Adults 18-34	KRZZ-FM	Mexican Regional	Spanish Broadcasting System	5	4

Appendix 3

Urban and Spanish Stations Ranked Amongst the Top 5 in Their Respective Markets
When Comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

Urban and Spanish Formatted Stations Ranked Amongst The Top 5 In Their Respective Markets When Comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

Source:

All radio station formats, AQH Persons estimates and AQH Person Station Ranks were gathered using Arbitron's Radio Diary MaxiMi\$er and PPM Analysis Tool products.

Only Urban and Spanish formatted stations are provided within this report. In order to warrant inclusion, a station must have ranked amongst the Top 5 within the Radio Metro for both the Spring Radio Diary Survey and August 2008 PPM survey periods and services in at least one of the demographic groups and dayparts listed below.

Demographics & Dayparts:

M-Su 6AM-12AM, M-F 6AM-10AM, M-F 10AM-3PM, M-F 3PM-7PM, M-F 7PM-AM, Sa-Su 6AM-12AM
Persons 12+, Adults 18-34, Adults 25-54, Adults 18-49, Adults 35-64

Arbitron Radio Metros

Page

Total New York Radio Metro	2
Los Angeles Radio Metro	4
Chicago Radio Metro	7
Total San Francisco Radio Metro	10
San Jose Radio Metro	12
Riverside-San Bernardino Metro	14

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

TOTAL NEW YORK RADIO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Sunday 6AM-MID</i>						
Adults 18-34						
WSKQ-FM	Spanish Tropical	Spanish Broadcasting System	4	4	32,200	19,100
WWPR-FM	Urban Contemporary	Clear Channel	3	2	36,200	25,000
Adults 25-54						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	1	5	67,000	36,100
Adults 35-64						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	1	3	72,000	48,400
<i>Monday-Friday 6AM-10AM</i>			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34						
WSKQ-FM	Spanish Tropical	Spanish Broadcasting System	4	5	44,500	15,000
WWPR-FM	Urban Contemporary	Clear Channel	5	2	40,700	26,100
Adults 18-49						
WBLS-FM	Urban Contemporary	Inner City Broadcasting Corporation	5	5	92,200	41,500
Adults 25-54						
WBLS-FM	Urban Contemporary	Inner City Broadcasting Corporation	3	4	103,400	47,400
Adults 35-64						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	4	1	82,000	63,300
<i>Monday-Friday 10AM-3PM</i>			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34						
WSKQ-FM	Spanish Tropical	Spanish Broadcasting System	3	2	51,200	32,600
WWPR-FM	Urban Contemporary	Clear Channel	4	3	40,300	32,200
Adults 18-49						
WSKQ-FM	Spanish Tropical	Spanish Broadcasting System	1	4	105,600	67,000
Adults 25-54						
WSKQ-FM	Spanish Tropical	Spanish Broadcasting System	2	5	96,800	63,600
Adults 35-64						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	3	5	89,500	61,200

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

TOTAL NEW YORK RADIO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Friday 3PM-7PM</i>						
Adults 18-34						
WWPR-FM	Urban Contemporary	Clear Channel	3	3	42,600	29,600
Adults 35-64						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	1	5	107,400	51,600
<i>Monday-Friday 7PM-MID</i>						
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Total Persons 12+						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	4	4	66,600	40,600
WWPR-FM	Urban Contemporary	Clear Channel	1	5	72,300	39,000
Adults 18-34						
WWPR-FM	Urban Contemporary	Clear Channel	2	2	32,800	17,400
Adults 18-49						
WWPR-FM	Urban Contemporary	Clear Channel	3	2	43,000	27,900
Adults 25-54						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	2	4	38,200	22,100
Adults 35-64						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	1	1	40,700	30,600
<i>Weekend 6AM-MID</i>						
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Total Persons 12+						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	1	4	85,900	57,800
Adults 18-34						
WWPR-FM	Urban Contemporary	Clear Channel	2	2	29,600	22,200
Adults 35-64						
WRKS-FM	Urban Adult Contemporary	Emmis Communications	1	1	56,300	41,800

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

LOS ANGELES RADIO METRO

				Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
				<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Sunday 6AM-MID</i>							
Total Persons 12+							
KLVE-FM	Spanish Contemporary	Univision		1	5	92,500	42,500
KSCA-FM	Mexican Regional	Univision		3	4	72,000	43,800
Adults 18-34							
KSCA-FM	Mexican Regional	Univision		5	5	29,600	15,000
Adults 18-49							
KLVE-FM	Spanish Contemporary	Univision		1	5	69,300	29,200
KSCA-FM	Mexican Regional	Univision		2	4	57,400	29,700
Adults 25-54							
KLVE-FM	Spanish Contemporary	Univision		1	4	64,900	27,800
KSCA-FM	Mexican Regional	Univision		2	3	52,200	28,400
<i>Monday-Friday 6AM-10AM</i>							
				<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Total Persons 12+							
KLVE-FM	Spanish Contemporary	Univision		2	5	143,300	49,200
KSCA-FM	Mexican Regional	Univision		1	2	156,700	62,000
Adults 18-34							
KSCA-FM	Mexican Regional	Univision		1	2	63,800	20,700
Adults 18-49							
KBUE-FM	Mexican Regional	Liberman Broadcasting Inc		4	5	88,100	29,300
KLVE-FM	Spanish Contemporary	Univision		2	4	105,800	34,400
KSCA-FM	Mexican Regional	Univision		1	2	124,000	40,400
Adults 25-54							
KBUE-FM	Mexican Regional	Liberman Broadcasting Inc		3	4	75,100	32,200
KLVE-FM	Spanish Contemporary	Univision		2	3	102,700	35,100
KSCA-FM	Mexican Regional	Univision		1	2	111,100	40,600
Adults 35-64							
KLVE-FM	Spanish Contemporary	Univision		2	5	79,000	27,100
KSCA-FM	Mexican Regional	Univision		1	4	81,500	31,000

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

LOS ANGELES RADIO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Friday 10AM-3PM</i>						
Total Persons 12+						
KLVE-FM	Spanish Contemporary	Univision	1	5	130,700	62,400
KSCA-FM	Mexican Regional	Univision	5	3	82,200	67,00
Adults 18-34						
KLVE-FM	Spanish Contemporary	Univision	1	5	56,500	20,400
Adults 18-49						
KLVE-FM	Spanish Contemporary	Univision	1	4	98,400	43,300
KSCA-FM	Mexican Regional	Univision	2	3	66,200	43,500
Adults 25-54						
KLVE-FM	Spanish Contemporary	Univision	1	5	91,100	41,300
KSCA-FM	Mexican Regional	Univision	2	3	61,800	42,600
<i>Monday-Friday 3PM-7PM</i>						
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34						
KLAX-FM	Mexican Regional	Spanish Broadcasting System	3	3	40,000	23,100
Adults 18-49						
KLAX-FM	Mexican Regional	Spanish Broadcasting System	4	3	67,200	41,900
Adults 25-54						
KLAX-FM	Mexican Regional	Spanish Broadcasting System	3	3	62,200	41,500
<i>Monday-Friday 7PM-MID</i>						
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 25-54						
KLAX-FM	Mexican Regional	Spanish Broadcasting System	4	1	15,900	27,100
KLVE-FM	Spanish Contemporary	Univision	1	5	30,400	13,100

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

LOS ANGELES RADIO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Weekend 6AM-MID</i>						
Total Persons 12+						
KLVE-FM	Spanish Contemporary	Univision	2	5	66,500	35,400
KSCA-FM	Mexican Regional	Univision	4	3	48,800	37,600
Adults 18-34						
KBUE-FM	Mexican Regional	Liberman Broadcasting Inc	5	5	21,800	12,700
Adults 18-49						
KBUE-FM	Mexican Regional	Liberman Broadcasting Inc	5	5	33,500	23,300
KLVE-FM	Spanish Contemporary	Univision	1	4	50,600	24,000
KSCA-FM	Mexican Regional	Univision	4	3	37,900	25,600
Adults 25-54						
KBUE-FM	Mexican Regional	Liberman Broadcasting Inc	3	5	29,000	21,500
KLVE-FM	Spanish Contemporary	Univision	1	4	44,400	21,700
KSCA-FM	Mexican Regional	Univision	2	3	34,300	24,000
Adults 35-64						
KSCA-FM	Mexican Regional	Univision	4	5	25,000	18,700

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

CHICAGO RADIO METRO

				Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
				<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Sunday 6AM-MID</i>							
Adults 18-34							
WLEY-FM	Mexican Regional	Spanish Broadcasting System		5	3	16,700	11,400
WOJO-FM	Mexican Regional	Univision		2	1	20,700	12,600
Adults 18-49							
WOJO-FM	Mexican Regional	Univision		2	3	34,700	23,300
Adults 25-54							
WOJO-FM	Mexican Regional	Univision		3	3	28,100	21,200
Adults 35-64							
WVAZ-FM	Urban Adult Contemporary	Clear Channel		1	5	33,600	20,000
<i>Monday-Friday 6AM-10AM</i>				<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34							
WLEY-FM	Mexican Regional	Spanish Broadcasting System		3	3	26,300	13,900
Adults 18-49							
WLEY-FM	Mexican Regional	Spanish Broadcasting System		4	5	36,100	21,800
WOJO-FM	Mexican Regional	Univision		3	3	45,200	28,300
Adults 25-54							
WOJO-FM	Mexican Regional	Univision		4	3	43,100	26,000
<i>Monday-Friday 10AM-3PM</i>				<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34							
WLEY-FM	Mexican Regional	Spanish Broadcasting System		3	2	23,200	16,100
WOJO-FM	Mexican Regional	Univision		1	1	27,400	16,200
Adults 18-49							
WLEY-FM	Mexican Regional	Spanish Broadcasting System		5	4	32,700	29,800
WOJO-FM	Mexican Regional	Univision		2	3	45,100	31,900
Adults 25-54							
WOJO-FM	Mexican Regional	Univision		3	5	36,700	29,300

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

CHICAGO RADIO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Friday 3PM-7PM</i>						
Adults 18-34						
WOJO-FM	Mexican Regional	Univision	3	3	27,300	14,900
Adults 18-49						
WOJO-FM	Mexican Regional	Univision	2	3	41,400	28,800
Adults 25-54						
WOJO-FM	Mexican Regional	Univision	4	4	32,100	26,700
WVAZ-FM	Urban Adult Contemporary	Clear Channel	2	5	38,100	22,200
Adults 35-64						
WVAZ-FM	Urban Adult Contemporary	Clear Channel	1	5	40,100	25,600
<i>Monday-Friday 7PM-MID</i>						
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Total Persons 12+						
WVAZ-FM	Urban Adult Contemporary	Clear Channel	3	5	29,100	19,000
Adults 18-34						
WGCI-FM	Urban Contemporary	Clear Channel	1	4	27,600	6,900
WOJO-FM	Mexican Regional	Univision	5	1	12,700	8,200
Adults 18-49						
WOJO-FM	Mexican Regional	Univision	2	3	20,500	11,800
Adults 25-54						
WVAZ-FM	Urban Adult Contemporary	Clear Channel	2	3	20,000	10,900
Adults 35-64						
WVAZ-FM	Urban Adult Contemporary	Clear Channel	2	3	21,900	13,000

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

CHICAGO RADIO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Weekend 6AM-MID</i>						
Total Persons 12+						
WVAZ-FM	Urban Adult Contemporary	Clear Channel	3	3	44,600	35,800
Adults 18-34						
WGCI-FM	Urban Contemporary	Clear Channel	1	2	25,700	9,700
WOJO-FM	Mexican Regional	Univision	2	1	17,200	10,600
Adults 18-49						
WOJO-FM	Mexican Regional	Univision	2	1	27,700	19,500
WVAZ-FM	Urban Adult Contemporary	Clear Channel	3	5	23,000	16,200
Adults 25-54						
WOJO-FM	Mexican Regional	Univision	3	3	21,700	18,100
WVAZ-FM	Urban Adult Contemporary	Clear Channel	2	2	27,300	18,900
Adults 35-64						
WVAZ-FM	Urban Adult Contemporary	Clear Channel	1	1	30,500	24,500

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

TOTAL SAN FRANCISCO RADIO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Sunday 6AM-MID</i>						
Adults 18-34						
KRZZ-FM	Mexican Regional	Spanish Broadcasting System	5	4	7,900	7,500
KSOL-FM	Mexican Regional	Univision	1	3	18,200	7,900
Adults 18-49						
KSOL-FM	Mexican Regional	Univision	1	3	25,800	13,000
Adults 25-54						
KSOL-FM	Mexican Regional	Univision	1	5	19,300	11,200
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Friday 6AM-10AM</i>						
Adults 18-34						
KSOL-FM	Mexican Regional	Univision	1	1	32,900	13,200
Adults 18-49						
KSOL-FM	Mexican Regional	Univision	1	1	50,200	21,500
Adults 25-54						
KSOL-FM	Mexican Regional	Univision	1	3	39,400	18,900
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Friday 10AM-3PM</i>						
Adults 18-34						
KRZZ-FM	Mexican Regional	Spanish Broadcasting System	3	2	15,000	11,900
KSOL-FM	Mexican Regional	Univision	1	3	26,800	10,300
Adults 18-49						
KRZZ-FM	Mexican Regional	Spanish Broadcasting System	4	4	21,800	17,400
KSOL-FM	Mexican Regional	Univision	1	3	36,500	17,500
Adults 25-54						
KSOL-FM	Mexican Regional	Univision	2	5	27,400	15,500
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Friday 3PM-7PM</i>						
Adults 18-34						
KRZZ-FM	Mexican Regional	Spanish Broadcasting System	5	3	10,900	9,800

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

TOTAL SAN FRANCISCO RADIO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Friday 7PM-MID</i>						
Adults 18-34						
KSOL-FM	Mexican Regional	Univision	4	5	6,900	3,600
Adults 18-49						
KSOL-FM	Mexican Regional	Univision	5	5	8,500	6,400
<i>Weekend 6AM-MID</i>						
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34						
KSOL-FM	Mexican Regional	Univision	1	2	12,200	7,100
Adults 18-49						
KSOL-FM	Mexican Regional	Univision	1	4	16,600	10,700

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

SAN JOSE RADIO METRO

				Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
				<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Sunday 6AM-MID</i>							
Adults 18-34							
KSOL-FM	Mexican Regional	Univision		1	3	5,000	3,000
Adults 18-49							
KSOL-FM	Mexican Regional	Univision		1	2	7,800	4,200
Adults 25-54							
KSOL-FM	Mexican Regional	Univision		1	4	5,700	3,400
<i>Monday-Friday 6AM-10AM</i>							
				<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34							
KSOL-FM	Mexican Regional	Univision		1	1	8,500	4,500
Adults 18-49							
KSOL-FM	Mexican Regional	Univision		1	1	14,900	5,800
Adults 25-54							
KSOL-FM	Mexican Regional	Univision		1	4	11,500	4,700
<i>Monday-Friday 10AM-3PM</i>							
				<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34							
KSOL-FM	Mexican Regional	Univision		1	1	7,700	4,000
Adults 18-49							
KSOL-FM	Mexican Regional	Univision		1	3	11,500	5,400
Adults 25-54							
KSOL-FM	Mexican Regional	Univision		2	5	7,700	4,300
<i>Monday-Friday 3PM-7PM</i>							
				<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34							
KSOL-FM	Mexican Regional	Univision		1	5	5,600	2,200

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

SAN JOSE RADIO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Friday 7PM-MID</i>						
Adults 18-34						
KSOL-FM	Mexican Regional	Univision	2	4	1,800	1,200
Adults 18-49						
KSOL-FM	Mexican Regional	Univision	4	4	2,600	1,800
			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Weekend 6AM-MID</i>						
Total Persons 12+						
KSOL-FM	Mexican Regional	Univision	2	5	6,600	5,700
Adults 18-34						
KSOL-FM	Mexican Regional	Univision	1	2	3,100	3,000
Adults 18-49						
KBRG-FM	Spanish Adult Hits	Univision	2	5	3,400	2,700
KSOL-FM	Mexican Regional	Univision	1	2	4,900	4,600
Adults 25-54						
KSOL-FM	Mexican Regional	Univision	1	2	3,800	3,900

Urban and Spanish Stations Ranked Amongst the Top 5 in their respective markets when comparing Spring 2008 Radio Diary AQH Persons to August 2008 PPM

RIVERSIDE-SAN BERNARDINO METRO

			Station Rank (AQH Persons) Sp08 Diary vs. Aug08 PPM		AQH Persons Estimates Sp08 Diary vs. Aug08 PPM	
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
<i>Monday-Sunday 6AM-MID</i>						
Adults 18-34						
KLYY-FM	Spanish Adult Hits	Entravision Holdings LLC	5	2	3,800	4,900
<i>Monday-Friday 10AM-3PM</i>						
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34						
KLYY-FM	Spanish Adult Hits	Entravision Holdings LLC	5	1	5,200	8,800
<i>Monday-Friday 7PM-MID</i>						
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34						
KLVE-FM	Spanish Contemporary	Univision	2	4	3,300	1,400
<i>Weekend 6AM-MID</i>						
			<u>Diary</u>	<u>PPM</u>	<u>Diary</u>	<u>PPM</u>
Adults 18-34						
KLYY-FM	Spanish Adult Hits	Entravision Holdings LLC	4	2	3,300	4,000

Appendix 4

Declaration of Robert Patchen

DECLARATION OF ROBERT PATCHEN

My name is Robert Patchen. I am a Senior Vice President and the Chief Research Officer of Arbitron Inc. ("Arbitron"). I have held that position since October of 2005. Prior to that date, I served as Vice President for Research Standards and Practices at Arbitron, a position that I held from 1998 to 2005. I have worked at Arbitron in a research capacity since 1986, when I joined the company as a Senior Projects Manager for Methods Research. In 1988, I was promoted to the position of Manager, Methods Research, and in 1992 I was promoted to the Director of Research.

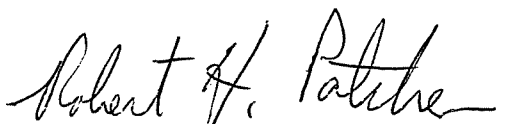
Prior to joining Arbitron in 1986, I served as a Project Director and Senior Research Associate for Westat, which is the largest public-sector survey organization in the United States and is engaged by contract to conduct various types of surveys for different U.S. government agencies.

I received a bachelor's degree in 1977 from the University of Maryland, and I also performed graduate course work in advanced survey methods and urban studies.

I have spent virtually my entire career in the area of survey research.

I have reviewed the foregoing Comments of Arbitron Inc. that are being submitted to the Federal Communications Commission (the "FCC") in the FCC's MB Docket No. 08-187. With respect to the matters of fact that are asserted in Subsections 1, 2, 3, and 4 of Section C of those Comments, except for those matters of which official notice may be taken by the FCC or for which a separate citation is provided, I declare under penalty of perjury that the matters of fact asserted in those Subsections are true and correct.

Executed on this 23rd day of September, 2008, at Columbia, Maryland.


Robert Patchen